rule from the many decided cases on the subject, as courts of admiralty are greatly influenced by equitable considerations and the special circumstances of the particular case, which outweigh the broad underlying principles governing the subject.[21] In fact, the declaration that in dealing with this question "each court is a law unto itself", well explains the seeming conflict of authorities.[22]

REPRESENTATION OF PERSONS NOT IN ESSE.—It is a rule in equity that all persons materially interested in the subject-matter of the suit should be made parties thereto, so that there may be a complete decree binding on all.[1] A limitation upon this rule is expressed by the doctrine of representation. Under one phase of this doctrine, parties to a litigation concerning realty will be deemed to represent persons not *in esse* so that they are bound by the judgment, if it appears that because of a similarity of interest the latter's rights will be fully protected.[2] This power to deal with property in which persons not *in esse* may have expectant estates, is inherent in a court of equity and exists independent of statute.[3] It may be said to be the result of convenience, or even of necessity, since otherwise property subject to expectant estates would be tied up for indefinite periods, all improvement would be checked, and the rights of the present generation would be needlessly sacrificed for those of a possible posterity.[4]

From an early date, there have been differences of judicial opinion as to when the future interests of unborn persons are properly represented. In England, it has been held that a judgment of partition against one seized of a fee defeasible by a shifting use, executory devise, or conditional limitation, cannot bind the expectant estates of those not *in esse*.[5] In this country, however, it matters not that

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[21]Hughes, Admiralty, § 175.

[22]See The City of Tawas, *supra*, p. 172. An example of the confusion in this phase of the law is illustrated by cases in which there is a conflict of laws. *Cf.* The Union (1860) Lush. 128; The Enterprise (D. C. 1870) 1 Low. 455. The existence of a lien is determined by the *lex loci contractus*. The Barque Havana (D. C. 1858) 1 Sprague 402; The Maud Carter (D. C. 1886) 29 Fed. 156. A maritime tort committed in one country gives a cause of action in the courts of a foreign nation; Panama R. R. *v.* Napier Shipping Co. (1897) 166 U. S. 280; but it has been suggested that it must first be shown that the tort is actionable in both jurisdictions. See Carr *v.* Fracis Times & Co., L. R. [1902] A. C. 176, 182.

[1]See Gregory *v.* Stetson (1890) 133 U. S. 579, 586.

[2]Gavin *v.* Curtin (1898) 171 Ill. 640; Baylor's lessee *v.* Dejarnette (Va. 1856) 13 Gratt. 152.

[3]Ridley *v.* Halliday (1901) 106 Tenn. 607. The legislature, as *parens patriae*, may, by special act, authorize the sale of the contingent rights of those not *in esse*. See Brevoort *v.* Grace (1873) 53 N. Y. 245. In Massachusetts, a statute provides for the appointment of a guardian *ad litem* to insure the protection of such interests. See Loring *v.* Hildreth (1898) 170 Mass. 328.

[4]See Bolfil *v.* Fisher (S. C. 1850) 3 Rich. Eq. 1; Hale *v.* Hale (1893) 146 Ill. 227.

[5]Goodess *v.* Williams (1843) 21 Eng. Ch. *595; but see Giffard *v.* Hort (1804) 1 Sch. & Lef. 386.

the estate of the representative is liable to be so defeated;[6] and it is sufficient to bring in the one entitled to the first estate of inheritance[7] or, if there be no one answering this description, then the life tenant may be treated as representing future interests.[8] There is some authority for the proposition that only those of the same class can represent persons not *in esse*; so where land was devised to the testator's daughter for life, remainder to those children who survived her, since it could not be determined that any children would survive, there could be no partition until the death of the life tenant.[9] It would seem, however, that the question of representation should not be determined so much by the character of the estate of the parties litigant, as by whether their interests are so closely related to those persons not *in esse* that the latter's rights would be fully protected.[10] If the proceeding is to foreclose a mortgage, or if a claim to property is set up in conflict with that of the common grantor, since all claiming estates through the grantor are united in interest, there is sufficient representation of the rights of persons not *in esse* if all the interested living parties are joined in the suit.[11] Similarly, persons not *in esse* may be bound by a judgment in an action to construe a will.[12]

In the recent case of *Adami* v. *Gercken* (N. Y. 1914) 164 App. Div. 472, an action for specific performance, the defense set up was that the plaintiff's title as purchaser under judgment in a partition suit was defective, since the contingent interests of those not *in esse* had not been cut off. The property in question had been devised by a testator to his wife for life, and he directed that after her death the estate should be divided among his children, or their issue, when his youngest child became twenty-one years old, or died. Immediately after the death of the widow and before the death of the youngest child, the testator's children, who claimed sole title to the property, obtained a decree for partition without making any of the living grandchildren parties to the suit, and the property was sold to the plaintiff. Subsequent to the partition proceedings and prior to the death of the youngest child, which occurred before he reached twenty-one years of age, other grandchildren were born, some of whom survived their parents who died before the death of the youngest child.

[6]See Mead *v.* Mitchell (1858) 17 N. Y. 210; Rutledge *v.* Fishburne (1902) 66 S. C. 155; Dunham *v.* Doremus (1897) 55 N. J. Eq. 511.

[7]Miller *v.* Texas & P. R. R. (1890) 132 U. S. 662.

[8]Sparks *v.* Clay (1904) 185 Mo. 393; Carneal *v.* Lynch (1895) 91 Va. 114; Freeman *v.* Freeman (Tenn. 1872) 9 Heisk. 301. In Downin *v.* Sprecher (1871) 35 Md. 474, representation was limited to one having an estate of inheritance; but this rule in Maryland has been changed by statute. See Downes *v.* Long (1894) 79 Md. 382.

[9]*Ex parte* Miller (1884) 90 N. C. 625. By a statute passed in 1903, this limitation is no longer the law in North Carolina. See Springs *v.* Scott (1903) 132 N. C. 548.

[10]*Cf.* McArthur *v.* Scott (1884) 113 U. S. 340; Hale *v.* Hale, *supra.*

[11]Mortgage foreclosures—McCampbell *v.* Mason (1894) 151 Ill. 500; Rutledge *v.* Fishburne, *supra*; Dunham *v.* Doremus, *supra.* Conflicting claims to property—Kent *v.* Church of St. Michael (1892) 136 N. Y. 10. In cases of strict partition, the interest of those coming after the particular estate is merely changed from an estate in common to an estate in severalty; or if the partition results in a sale, they have a corresponding interest in the proceeds. See McArthur *v.* Scott, *supra,* p. 401.

[12]Tonnele *v.* Wetmore (1909) 195 N. Y. 436.

The court held that the title obtained by the partition and sale proceedings was defective, since the contingent interests of the grandchildren not then *in esse,* who later took under the will, had not been properly represented. By statute in New York, expectant estates of persons, whether *in esse* or not, may be bound by a judgment of partition.[13] But it is also the rule in New York that a sale which is the result of partition proceedings will not be effective as to contingent interests of persons not *in esse,* unless the judgment provides for and protects such interests by substituting and preserving a fund commensurate in value with them.[14] No such provision having been made in the principal case, the judgment in the partition suit did not bar the estates in expectancy of the unborn grandchildren. Aside from this, however, there was no representation of the grandchildren not *in esse,* since the children, who might under ordinary circumstances properly represent such future rights, refused to recognize any contingent interests and divided the property among themselves on the theory of complete ownership, so that the rights of the children instead of being practically identical with, were actually hostile to, those of the grandchildren.[15]

FORCIBLE ENTRY AND DETAINER.—Forcible entry and detainer, though commonly alleged in the same complaint, are, in most jurisdictions, separate and distinct torts.[1] Two fundamental requisites underlie both actions: the plaintiff must have been in actual, peaceable possession of the premises,[2] and he must have been ousted from that possession by the forcible entry, or the forcible detainer, charged against the defendant.[3] Under this state of facts, relief is granted on the theory that the disturbance of any peaceable possession tends to breach of the peace;[4] and since this result accrues irrespective of the relative rights of the parties, legal title to the premises cannot be interposed as a defense to these actions.[5]

In the absence of express statutory provision, no particular duration of plaintiff's possession is required,[6] but it must have been exclusive and not scrambling.[7] The plaintiff need not have actually

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[13]N. Y. Code of Civ. Proc., § 1557. For a discussion of the procedure for partition under the N. Y. Code, see article by Surrogate Robert L. Fowler in 3 Columbia Law Rev., 295.

[14]Monarque *v.* Monarque (1880) 80 N. Y. 320.

[15]See Downey *v.* Seib (1906) 185 N. Y. 427.

[1]Shelby *v.* Houston (1869) 38 Cal. 410; see Fults *v.* Munro (1911) 202 N. Y. 34.

[2]Brooks *v.* Warren (1886) 5 Utah 118; Hopkins *v.* Calloway (1855) 35 Tenn. 11.

[3]Schmidberger *v.* Bloner (N. Y. 1892) 66 Hun 527.

[4]See 2 Cooley, Torts (3rd ed.) 663.

[5]Stephens *v.* McCloy (1873) 36 Iowa 659; Sitton *v.* Sapp (1895) 62 Mo. App. 197; Hammond *v.* Doty (1900) 184 Ill. 246. But the question of title may come up as a collateral issue, as where an occupant under color of title to an entire tract of land, takes open, visible possession of some definite part, thereby gaining constructive possession of the whole. Seals *v.* Williams (1902) 80 Miss. 234.

[6]Cain *v.* Flood (1891) 14 N. Y. Supp. 776, affd. (1893) 138 N. Y. 639.

[7]Blake *v.* McCray (1888) 65 Miss. 443; Brooks *v.* Warren, *supra.*